2016 IL App (1st) 152329-U

SECOND DIVISION
June 7, 2016

No. 15-2329

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PAMELA DIXON, Plaintiff-Appellant, v. MB REAL ESTATE SERVICES, LLC and UNKNOWN SECURITY OFFICER, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County. No. 12 L 14463 Honorable John H. Ehrlich Judges Presiding

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err when it entered summary judgment in defendant's favor. The security guard was not defendant's agent or employee; plaintiff cannot establish the knowledge requirement for her negligent retention claim; and plaintiff failed to establish that providing security services cannot be delegated to a third party.

¶ 2 Plaintiff Pamela Dixon filed this case alleging that she was assaulted by a security guard at Millennium Park in Chicago. MB Real Estate is the property manager for park and plaintiff seeks to hold it liable for the alleged actions of the security guard. The security guard is actually an

employee of a separate company, Titan Security Services, that contracted with MB to provide security services for the park. MB moved for summary judgment arguing that it is not responsible for the security guard's alleged conduct. Because the evidence demonstrates that defendant MB cannot be liable as a matter of law, we affirm.

¶ 3 BACKGROUND

¶ 4 On January 22, 2011, plaintiff Pamela Dixon and her fiancé Douglas Lavell were taking pictures in Millennium Park to use in their wedding announcement. Their nephew, Tyler Washington, accompanied them and was the one taking the pictures. They were standing on top of a picnic table in front of Cloud Gate[1] when they were approached by a security officer now known to be Robin Cotton. Lavell testified that Cotton began to yell "Get the fuck off those tables." Lavell testified that Cotton also hurled racial slurs at them because they are an interracial couple. Lavell, offended by Cotton's alleged conduct, threw snow at her. According to Lavell, as he and Dixon were walking away, Cotton grabbed Dixon by the hair and threw her to the ground. Other security personnel and Chicago police officers came to the scene at which time Cotton allegedly tried to physically attack Dixon again. Dixon claims that the assault caused her to tear her rotator cuff which required surgery.

¶ 5 In a deposition, Cotton testified that she told the couple to get off the picnic table three times before they complied and that the couple then became hostile. Cotton testified that she did not use any racial slurs in her confrontation with them. Cotton's position is that she was the victim. Cotton claims that it was the couple's nephew that initiated the physical confrontation as he grabbed her and threw her to the ground as they all were walking from the location of the picnic

[1] The nickname for Cloud Gate is "The Bean" because of the sculpture's shape. Wikipedia, "Cloud Gate," https://en.wikipedia.org/wiki/Cloud_Gate (last visited May 12, 2016).

table. Cotton also testified that Lavell kneed her in the head and Dixon began punching her while she was on the ground. At his deposition, Lavell admitted that he put his knee on the back of Cotton's head while she was on the ground. He was charged with battery and pled guilty.

¶ 6 Dixon filed this case. The case was originally filed against MB and "Unknown Security Officer," a person we now know to be Cotton. The complaint has three counts which Dixon titled: (1) battery, (2) negligence, and (3) *respondeat superior*. Count I is against Cotton only and counts II and III are against MB. Dixon maintains that MB is liable because Cotton is its employee or agent, or that MB is liable for negligence in hiring, training, and supervising her.

¶ 7 The city of Chicago uses MB as its agent to act as the property manager for Millennium Park. MB contracts with a company called Titan Security Services, Inc. to provide security for the park. Cotton is undisputedly an employee of Titan. The question presented in this appeal is whether Cotton can be considered an employee or agent of MB for purposes of vicarious liability. Following an oral argument, the trial court concluded that MB could not be held liable for Cotton's alleged conduct and entered summary judgment in MB's favor. The trial court then entered a finding pursuant to Illinois Supreme Court Rule 304(a) that there was no just reason for delaying enforcement or an appeal of its order.

¶ 8 On February 28, 2008, MB and Titan entered into what is titled a "service contractor agreement." In it, Titan agreed to provide security services for Millennium Park. The contract states that Titan and its employees' relationship with the city shall "be that of an independent contractor" and that neither Titan nor its employees "shall be deemed an agent, servant, or employee" of Chicago. The parties have both assembled and highlighted evidence to support their theories on the existence of a principal-agent relationship.

¶ 9 Like in the trial court, plaintiff points to the service contract and argues that there is an agency relationship between MB and Titan's employees because MB: has the right to order Titan to remove employees assigned to the park; can modify staffing of Titan employees; requires Titan to submit job requirements and descriptions for security officers for MB's approval; must approve security officer instructions and training programs; requires Titan to submit copies of training records; must approve the uniforms worn by the security officers; may request Titan to perform services or provide materials not in the written agreement; and requires Titan to provide all documentation related to security upon written request.

¶ 10 Plaintiff also points to the deposition testimony of Peter Moreau, the director of security for MB. Moreau's sole responsibility is to oversee security personnel at Millennium Park. He provides a daily briefing sheet to the security personnel and observes what they are doing to make sure the officers are performing their duties. Moreau also testified that he has the authority to ask Titan to not assign certain individuals to Millennium Park. Mary Towns, the Titan security supervisor that is assigned to Millennium Park, testified that MB, through Moreau, gave security personnel guidelines each morning about what is going on in the park on a particular day.

¶ 11 MB, on the other hand, points to the agreement between it and Titan that explicitly and repeatedly expresses that Titan and its employees are to be independent contractors. MB also points out that Titan is the entity that: pays its employees' salaries; is responsible for their benefits and taxes; determines when and whether employees can take time off; provides employees with uniforms; provides their training; ensures that the employees it assigns to the park are licensed; determines the employees' schedules; determines where the individual security officers are positioned; and provides security supervisors to monitor its ground level security officers.

¶ 12 MB also points out that it cannot hire or fire employees. It may only request that certain of Titan's employees not be assigned to Millennium Park, but not be removed from their jobs altogether. While the agreement requires Titan to supply employee handbooks, MB does not have any input in the handbook nor does MB approve the book. MB does not interview or vet the officers prior to them being assigned to Millennium Park. If there was an incident or altercation with a security officer at the park, Titan would investigate and interview witnesses. MB's only involvement with such an incident would be that Titan's supervisor would document the incident and provide a copy to MB.

¶ 13 ANALYSIS

¶ 14 We review an order granting summary judgment *de novo*. *Illinois Tool Works Inc. v. Travelers Casualty & Surety Co.*, 2015 IL App (1st) 132350, ¶ 8. Under the doctrine of *respondeat superior*, a principal or employer can be held liable for acts committed by an agent or employee acting within the scope of his agency or employment. *Lang v. Silva*, 306 Ill. App. 3d 960, 972 (1999). One who hires an independent contractor, though, is generally not liable for the negligent or intentional acts or omissions of the contractor. *Id*. The test of agency is whether the alleged principal has the right to control the manner and method in which work is carried out by the alleged agent and whether the alleged agent can affect the legal relationships of the principal. *Anderson v. Boy Scouts of America, Inc.*, 226 Ill. App. 3d 440, 443 (1992). The question of whether a person is an employee or an independent contractor is generally a question of fact, but question may be decided as a matter of law when the relationship is so clear as to be indisputable. *Doe v. Brouillette*, 389 Ill. App. 3d 595, 606, 906 N.E.2d 105, 116 (2009)

¶ 15 MB begins its argument by pointing out that its service agreement with Titan explicitly

states that Titan and Titan's employees are not MB's employees, but are contractors. Yet just because the written contract between Titan and MB says that the security guards are independent contractors does not mean that MB cannot be deemed to be an employer. A written contract is not conclusive of the relationship between the alleged agent and the alleged principal. *Yuhas v. Allis-Chalmers Distribution Service Corp.*, 12 Ill. App. 3d 814, 822 (1973). On the other hand, plaintiff points to a variety of the provisions in the service agreement that she claims proves that the security officers are MB's employees. But just because certain provisions in the contract contemplate some degree of control over the alleged agent does not mean that person will be deemed to be an employee. The written contract is but one factor to consider, but no one factor is dispositive in determining the relationship status of parties in a given case. *Davila*, 333 Ill. App. 3d at 596. Instead, in determining whether an alleged principal can be held vicariously liable to an injured third party, Illinois courts look at the actual practice followed by the parties. *Id*; See also *Davila v. Yellow Cab Co.*, 333 Ill. App. 3d 592, 595 (2002).

¶ 16 The following factors may be considered in making the determination of whether a party is an employee or independent contractor: the right to control the manner in which the work is performed; the right to discharge; the method of payment; whether taxes are deducted from the payment; the level of skill required to perform the work; and the furnishing of the necessary tools, materials, or equipment. *Brouillette*, 389 Ill. App. 3d at 606 (quoting *Lang*, 306 Ill. App. 3d at 972). Other considerations like the matter of hiring and the character of the supervision of the work may also be significant. *Shoemaker v. Elmhurst-Chicago Stone Co.*, 273 Ill. App. 3d 916, 920 (1994). While no one single factor is considered determinative, the right to control the work is considered to be the predominant factor. *Lang v. Silva*, 306 Ill. App. 3d at 972.

¶ 17 Plaintiff cannot carry the day on any single factor. The service agreement could not be clearer that MB and Titan intended Titan's employees to be independent contractors. But more importantly, in practice, the parties actually followed the independent contractor relationship structure that they set up in the agreement. Going through the factors set forth above, Titan is in charge of all the hiring and firing. MB has no right to hire employees—it contractually relinquished that—and could in no manner terminate Titan's employees, it could only request that certain ones not be reassigned to the park. At the outset of the guards being supplied, MB has no input whatsoever on who is assigned to the park, the guards are chosen by Titan. Titan is fully responsible for paying its employees' salaries and benefits. All manner of payment came from Titan, not MB. Titan provides employees with uniforms and, aside from one extenuating exception, all other materials needed to carry out their duties such as: communications equipment, gear for inclement weather, flashlights, and so forth.

¶ 18 Touching on some other relevant considerations, Titan provides for its employees' training and licensure. Titan supplies the employees with employee handbooks without input or approval of the content from MB. It is up to Titan when and whether employees can take time off or take vacation time. Titan is responsible for investigating any claim of misconduct made by a park patron against one of its employees and to discipline the employee if necessary. MB employee policies do not apply to Titan employees.

¶ 19 As for control, Titan provides onsite security advisers that monitor and oversee the ground level security officers in completing their day-to-day tasks. Titan, not MB, determines where the individual security officers are positioned. All instruction on how to perform ground level security operations came from Titan supervisors to their personnel. It is Titan's responsibility to

make sure all security posts are covered. Titan determines and creates the employees' schedules. MB, through its representative Moreau, did not even speak with the general security officers. Except for giving a daily briefing sheet that generally outlines certain things going on in the park on a given day, MB does not supervise the contractors at all. But even the daily briefing sheet is given to a Titan supervisor and then disseminated to the ground level security personnel.

¶ 20 This is really a classic example of an independent contractor situation. MB provides exceptionally limited macro-level oversight in its role of managing the entire property. All micro-level management, supervision, and employee control is vested in Titan. The service agreement essentially takes away any right or obligation on the part of MB to supervise, and all of the evidence is consistent that the parties upheld those terms in practice. MB exercises no direct control over Titan's ground level employees—like Cotton—whatsoever.

¶ 21 An independent contractor is a person that undertakes to produce a certain result but is not controlled as to the method in which he obtains that result. *Lang*, 306 Ill. App. 3d at 972. We agree with the trial court that Cotton is not an employee or agent of MB. Although the question of whether a person is an employee or independent contractor is normally one of fact, based on the evidence presented, no contrary finding could stand. The trial court properly granted summary judgment for MB on this issue.

¶ 22 Plaintiff contends that even if Cotton is an independent contractor, MB can still be liable for the negligent retention of Cotton. Exceptions to the general rule of non-liability for the acts or omissions of an independent contractor exist where the employing party fails to use reasonable care in selecting the contractor or directs the contractor to commit the act in question. *Lang v. Silva*, 306 Ill. App. 3d at 974. To succeed in a cause of action regarding the negligent hiring or

retention of an independent contractor, a plaintiff must show that the principal negligently hired or retained the independent contractor, when principal knew or should have known that the contractor was unfit for the required contracted job so as to create a danger of harm to other third parties. *Hayward v. C.H. Robinson Co.*, 2014 IL App (3d) 130530, ¶ 35.

¶ 23 In support of her negligent retention claim, plaintiff posits that MB was aware that Cotton was unfit to be a security guard. Plaintiff relies almost exclusively on the testimony of DeWitt Barlow, one of Cotton's fellow security officers at Millennium Park. Barlow testified that park patrons had complained to him and other security officers about Cotton's rude, unprofessional behavior more than five times. Barlow further testified that he and the other guards discussed among themselves that she was rude and unprofessional. Plaintiff then jumps the causal chain and argues that because *formal* complaints were required to be recorded by a Titan supervisor and notice was then required to be given to MB, "[c]learly MB Real Estate knew or should of known of Ms. Cotton's history."

¶ 24 Plaintiff has not produced any evidence that any formal complaint was ever made against Cotton. Plaintiff has not produced any evidence that any situation reports were actually made by a Titan supervisor and given to MB. Barlow did not testify that he actually reported anything at all about Cotton to a Titan supervisor and certainly not to anyone at MB. Plaintiff has not produced any evidence to support its logical leap that MB knew or should have known anything about Cotton being rude to park patrons. The Titan supervisor, Mary Towns, said she was unaware of any complaints about Cotton and never drew up any situation reports about her. Cotton herself testified that she had never been "written up." Plaintiff failed to produce any evidence that could prove that the alleged complaints went up the chain so that anyone from MB

knew or should have known about any improper behavior. After all, as set forth above, MB had no interaction with ground level officers and no direct oversight of Titan's employees.

¶ 25 The final argument plaintiff advances is that MB's duty to provide security of the park is non-delegable, so it must be held to account for Cotton's alleged actions. Plaintiff relies on *Reith v. General Telephone Co. of Illinois*, 22 Ill. App. 3d 337, 341 (1974) in which we stated that "[a]n individual or a corporation cannot evade liability for negligence by delegating performance of work to an independent contractor where such individual or corporation is carrying on an activity involving danger to others, under a franchise or license granted by public authority and subject to certain obligations imposed by public authority." Plaintiff argues that carrying out security can involve danger to others, so MB cannot delegate and is responsible for Cotton's alleged acts. Plaintiff does not maintain this argument in its reply brief, but we address it nonetheless.

¶ 26 Plaintiff offers no authority for the proposition that someone providing security services in a public park is "carrying on an activity involving danger to others." The authority plaintiff relies upon, *Reith*, is readily distinguishable in that it deals with excavating a public way while installing underground cables. *Id*. at 343. That case has only ever been applied to utilities, never park security or anything of the kind. On the contrary, we have recognized security guards as independent contractors so as to not impute liability to an employer on numerous occasions. *See, e.g.*, *Pippin v. Chicago Housing Authority*, 78 Ill. 2d 204, 209-10 (1979); *Amigo's Inn, Inc. v. License Appeal Commission of City of Chicago*, 354 Ill. App. 3d 959, 967 (2004). Certainly plaintiff has not sufficiently developed an argument that would lead us to hold that no entity administering a public place or event can ever delegate security services to an independent contractor.

¶ 27 CONCLUSION

¶ 28 Accordingly, we affirm.

¶ 29 Affirmed.